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REMARKS

Claims 10-20 are pending. Claims 10-20 stand rejected. Claims 17-19 have been amended for clarity. No new matter is introduced with these amendments.

Reply to the Rejection of Claims 17-19 under 35 U.S.C. § 112, 2nd Paragraph

Claims 17-19 have been rejected under 35 U.S.C. §112, second paragraph as being indefinite. Specifically, the Examiner states that "the instant claims recite the amphoteric resin <u>as</u> an aqueous liquid. To overcome this rejection, the Examiner respectfully suggests that Applicant amend the claims to recite the resin in an aqueous liquid."

Regarding the Examiner's remark that "a liquid is contrary to the definition of a resin", Applicants respectfully disagree. Referring to HAWLEY'S CONDENSED CHEMICAL DICTIONARY, 11th ed., p. 1004, Van Nostrand Reinhold, New York (1987), a 'liquid resin' is defined as "[a]n organic polymeric liquid which, when converted to its final state for use, becomes solid (ASTM)."

Further, it is well recognized that an applicant for patent is his or her own lexicographer (Markman v. Westview Instruments, Inc., 52 F.3d 967, 979, 34 U.S.P.Q.2d 1321, 1330 (Fed. Cir. 1995) (in banc) aff'd, 517 U.S. 370, 38 U.S.P.Q.2d 1461 (1996); In re Glaug, 283 F.3d 1335, 1340, 62 U.S.P.Q.2d 1151 (Fed. Cir. 2002) stating "[T]he inventor's lexicography must prevail. . ."). In this regard, Applicants have defined the aqueous liquid to refer to "the water dispersion in which the amphoteric urethane resin is dispersed as well as the water solution in which [the] amphoteric urethane resin is dissolved completely" (Specification: p. 14, lines 16-17). Accordingly, one skilled in the art would understand reference to the amphoteric resin as an aqueous liquid to mean the water solution in which the amphoteric resin is dissolved and/or dispersed.

Claims 17-19 have been amended to clarify that the amphoteric urethane resin is in an aqueous liquid as suggested by the Examiner. Descriptive basis for this amendment may be found in the specification at page 14, lines 16-17.

It is believed that this amendment overcomes the rejection of claims 17-19 under 35 U.S.C. §112, second paragraph. Withdrawal, therefore, of this rejection is respectfully requested.

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Reply to the Rejection of Claims 10, 15, 16, 19 and 20 Under the Judicially Created Doctrine of Obviousness-Type Double Patenting

Claims 10, 15, 16, 19 and 20 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over claims 14 and 24-27 of copending U.S. Application No. 10/049;361 (now issued as U.S. Patent No. 6,737,069 to Asaoka *et al.* ("Asaoka")). Specifically, the Examiner states -

The instant invention recites a composition comprising an amphoteric urethane resin having at least one carboxyl group and at least tertiary amino group in one molecule, and a water soluble resin. A dependent claim further recites the resin as having at least one polysiloxane bond, wherein a polysiloxane is a silicone polymer. '361 discloses a composition comprising an amphoteric urethane resin having at least one carboxyl group and at least one tertiary amino group in a molecule, and a silicone polymer. '361 does not explicitly recite a water-soluble resin. However, the amphoteric urethane of '361 is a water-soluble resin. Thus, both the instant invention and '361 teach a composition comprising an amphoteric urethane resin having at least one carboxyl group and at least one tertiary amino group in one molecule, a silicone polymer, and a water soluble resin. . . .

.... It is respectfully pointed out that the instant specification teaches that the polysiloxane bond comes from a silicone polymer. Applicant's argument regarding the behavior is not persuasive, as the claims are directed to a product and not to behaviors.

For the following reasons, Applicants respectfully traverse the Examiner's rejection of claims 10, 15, 16, 19 and 20 under the judicially created doctrine of obviousness-type double patenting.

Asaoka teaches cosmetic compositions containing amphoteric polyurethanes. The amphoteric urethane resin includes both carboxyl group(s) and tertiary amino group(s) in a molecule (Abstract; col. 1, lines 41-44 and 57-62; col. 2, lines 15-18). This resin can be formed by reacting a polyol compound, a polyisocyanate compound, a polyethylene oxide derivative having active hydrogen(s) and carboxyl group(s) in the presence of excess isocyanate groups to form an isocyanate group-containing prepolymer, and reacting the isocyanate group-containing prepolymer with a compound having active hydrogen(s) and tertiary amino group(s) (col. 5, lines 1-15).

Preferably, the amphoteric urethane resin includes polysiloxane bond(s) in the structure (col. 5, lines 41-43). This polysiloxane-containing amphoteric urethane resin can be prepared by reacting a polyol compound, a polysicoxanate compound, a polysiloxane compound having active hydrogen(s) and carboxyl group(s) in the presence of excess isocyanate groups to form an

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isocyanate group-containing prepolymer, and reacting the isocyanate group-containing prepolymer with a compound having active hydrogen(s) and tertiary amino group(s) (col. 5, line 57 – col. 6, line 4). Asaoka addresses the problem of providing a base resin for cosmetics that provides improved touch/feel and spread versus traditional water-soluble resins (col. 1, lines 11-40). Accordingly, Asaoka simply teaches a base urethane resin for use in cosmetics. As noted by the Examiner, Asaoka does not teach or suggest a cosmetic composition comprising a blend/mixture/combination of its amphoteric urethane resin and a water soluble resin.

When applying 35 U.S.C. § 103, the following tenets of patent law must be adhered to: (a) the claimed invention must be considered as a whole; (b) the references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination; (c) the references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and (d) reasonable expectation of success is the standard with which obviousness is determined (*Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986).

In contrast to Asaoka, the present invention is directed towards a cosmetic composition having at least two separate components - a polyurethane resin and a water soluble resin. In order for Asaoka to render the present invention obvious, Asaoka must suggest the desirability and thus the obviousness of making the combination of the amphoteric urethane resin and a water soluble resin, thereby providing both durability and touch (Specification: p. 2, line 19 - p. 3, line 3). As stated by the Examiner, the content of Asaoka "does not explicitly recite a water-soluble resin". In this respect, the present invention differs from Asaoka in that Asaoka is directed towards an amphoteric urethane resin as a base cosmetic resin, whereas the present invention is directed towards the blend or combination of a polyurethane resin and a water soluble resin in a cosmetic composition. As Asaoka does not teach or suggest the water-soluble resin component, Asaoka cannot be said to provide one skilled in the art with the motivation to combine an amphoteric urethane resin with a water soluble resin in a cosmetic composition. Accordingly, Asaoka fails to meet the *Graham* criteria for obviousness with respect to the present invention (*Graham v. John Deere*, 383 U.S. 1, 17, 148 U.S.P.Q. 459 (1966)).

For at least these reasons, Asaoka does not render obvious claims 10, 15, 16, 19 and 20 under the judicially created doctrine of obviousness-type double patenting. Withdrawal, therefore, of this rejection is respectfully requested.

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Reply to the Rejection of Claims 10, 14, 15, 17, 18 and 20 under 35 U.S.C. § 103(a)

Claims 10, 14-15, 17-18 and 20 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Publication No. 2002/0071811 to Bhatt *et al.* ("Bhatt") in view of U.S. Patent No. 6,335,003 to Kim *et al.* ("Kim"). Specifically, the Examiner states –

The instant invention is directed toward a composition comprising an amphoteric urethane resin having at least one carboxyl group and at least one tertiary amino group in one molecule, and a water-soluble resin.

Bhatt et al. teach hair spray compositions containing a carboxylated polyurethane. The polyurethane contains polyoxyalkylene units, such as polyoxyethylene soft segments which impart hydrophobicity to the polyurethane. Amines, such as ethylene diamine, propylenediamine, monoethanolamine, and diglycolamine, can be added to the polyurethane resin reaction mixture. The carboxylated polyurethane resins are soluble in ethanol/water mixtures. The reference lacks tertiary amines. See abstract; [0024]-[0025]; [0036]; [0050].

Kim et al. teach cosmetically acceptable polyurethane resins. The polyurethanes are formed from at least one diisocyanate or reaction product thereof with one or more compounds containing two or more active hydrogen atoms per molecule, and at least one diol, primary or secondary amino alcohol, primary or secondary diamine or primary or secondary triamine each with one or more tertiary, quarternary or protonated tertiary amine nitrogen atoms. Propylene diamine is taught as a suitable diamine. The polyurethanes resins are taught as beneficial because of their flexibility and decrease of stickiness and brittleness when applied to the hair. Hairsprays and hair setting lotions are taught as preferred forms of the compositions. See abstract; Col. 1, line 41-Col. 2, line 11; Col. 2, line 58-line 65; Col. 7, line 57-Col. 8, line 7.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute the tertiary amines taught by Kim et al. for the amines taught by Bhatt et al. because of the expectation of achieving a hair spray formulations that in addition to imparting excellent set retention to the hair, as taught by Bhatt, additionally decrease the stickiness and brittleness of the product when applied to the hair and maintain elasticity. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute the tertiary amines taught by Kim et al. for the amines taught by Bhatt et al. because Bhatt et al. teach diamines as part of their resins and Kim et al. teach diamines as interchangeable with tertiary amines in polyurethane resins for application to the hair.

It is respectfully pointed out that a) the carboxyl group and tertiary amine of the combined polyurethane resin result in an amphoteric resin, and that b) the combined resin is a water-soluble resin. . . .

.... Applicant argues, "the reference does not teach the use of tertiary amino groups, nor that the carboxyl group and tertiary amino group should be in the

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same molecule. Further, Bhatt neither teaches nor suggests that the cosmetic composition contain a water soluble resin in addition to the polyurethane". This argument is not persuasive. First, it is respectfully pointed out that this is a 103-obviousness rejection and not a 102-anticipation rejection. Thus, Bhatt et al. is not relied upon to teach all the limitations of the instant claims. It is respectfully pointed out that Kim et al. is relied upon to teach tertiary amines. Second, it is respectfully pointed out that the polyurethane resin of Bhatt et al. is a water soluble resin. There is no limitation in the instant claim that recites "a water soluble resin in addition to the polyurethane" as argued by Applicant.

Applicant argues, "to form the polyurethane of the present invention, one skilled in the art would need to not only choose to combine the two references, but also choose that the polyurethane should be amphoteric (not cationic as in Kim), and to substitute tertiary amino groups out of the long list given by Kim". This argument is not persuasive. First, it is respectfully pointed out that Kim et al. is relied upon for its teachings of polyurethane resins, wherein diamines and tertiary amines are taught as interchangeable. There is no choosing between amphoteric and cationic, as argued by Applicant. The Examiner further points out that the test for obviousness is not whether the features of one reference may be bodily incorporated into the other to produce the claimed subject matter but simply what the combination of references makes obvious to one of ordinary skill in the pertinent art. In the instant case, Kim teaches the interchangeability of diamines and tertiary amines in polyurethane resins comprising carboxyl groups.

Applicant argues, "Even if one skilled in the art would choose to combine the two references in such manner, they would not result in the present invention". This argument is not persuasive. First, while Applicant has made such a statement, Applicant has provided no rationale to support this statement. Second, as pointed out above, the test for obviousness is not whether the features of one reference may be bodily incorporated into the other to produce the claimed subject matter but simply what the combination of references makes obvious to one of ordinary skill in the pertinent art.

Applicant argues, "there is not teaching or suggestion in either reference that it would be advantageous to have these two groups on the same molecule. Further, neither reference teaches the advantage of including a water soluble resin in the cosmetic composition to increase durability". This argument is not persuasive. First, the argument is not commensurate in scope with the instant claims, as the claims are not directed to advantages, but to a product. If Applicant is attempting to establish unexpected results, the Examiner respectfully directs Applicant to the guidelines for showing unexpected results. It is applicant's burden to demonstrate unexpected results over the closest prior art. See MPEP 716.02, also 716.02(a)-(g). Furthermore, the unexpected results should be demonstrated with evidence that the differences in results are in fact unexpected and unobvious and of both statistical and practical significance. Ex parte Gelles, 22 USPQ2d 1318, 1319 (Bd. Pat. App. & Inter. 1992). Moreover, evidence as to any unexpected benefits must be "clear and convincing" In re Lohr, 137 USPQ 548 (CCPA 1963), and be of a scope reasonably commensurate with the scope of the subject matter claimed,

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In re Linder, 173 USPQ 356 (CCPA 1972). Second, it is respectfully pointed out that the amines of the carboxylated polyurethane resins of the combined reference are in one molecule.

Applicant states, "Applicant does not understand the Examiner's statement 'the combined resin is a water-soluble resin', as two components, both the polyurethane and the water soluble resin, are claimed". This argument is not persuasive. As pointed out above, the instant independent claim does not require the two resins to be distinct.

For the following reasons, Applicants respectfully traverse the Examiner's rejection of claims 10, 14-15, 17-18 and 20 as being unpatentable over Bhatt in view of Kim.

Bhatt teaches aerosol and non-aerosol hair spray compositions containing hydrophilic, carboxylated polyurethane resins (p. 2, ¶ 0016; p. 3, ¶ 0030). More specifically, these compositions include at least three components - (a) about 0.25% to about 6%, by total weight of the composition, of a carboxylated polyurethane resin, (b) 0% to about 80%, by total weight of the composition, of an alcohol, like ethanol, and (c) about 15% to about 80%, by total weight of the composition, of water (p. 2, ¶ 0018).

The carboxylated polyurethane resin is produced by the reaction of (a) a polyoxyalkylene diol; (b) an alkylene glycol; (c) a diisocyanate; (d) water in an amount of about 0.001% to about 0.95% of the combined weight of the reactants; and (e) a 2,2-di(hydroxymethyl)alkanoic acid, wherein the ratio of NCO (isocyanate) groups to OH (hydroxyl) groups in the water, diol, and glycol mixture is about 0.4 to about 1.1 (p. 2, ¶ 0023; p. 3, ¶ 0034; claim 1).

Bhatt states that optional ingredients can be incorporated into the hair spray composition as long as they doe not adversely affect the esthetics or efficacy of the hair spray composition. The only guidelines or suggestions that Bhatt provides as to this 'optional ingredient' is that it can be a propellant (p. 6, ¶ 0063). Still, Bhatt provides no teaching or suggestion of a hair spray composition that includes a water-soluble resin as one of its optional ingredients. More particularly, Bhatt does not teach or suggest a cosmetic composition that includes both a water-soluble resin and an amphoteric urethane resin having at least one carboxyl group and at least one tertiary amino group in one molecule (see, e.g., p. 12, ¶ 0120 providing examples of aerosol and non-aerosol hair spray compositions).

Kim teaches cosmetic compositions containing cationic polyurethanes and polyureas. Kim is relied upon by the Examiner for its teachings of polyurethane resins wherein diamines and tertiary amines are taught as interchangeable. Kim teaches using these polyurethane resins

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in place of other film-forming polymers such as polyvinyl pyrrolidone (col. 1, line 59 - col. 2, line 15). Kim does not teach or suggest a cosmetic composition that includes both an amphoteric urethane resin and a water-soluble resin (see, e.g., Formulations A-C provided in the Example, which only suggest formulations containing the polyurethane resin of Kim). As such, Kim adds nothing to Bhatt as neither reference, alone or in combination, teach or suggest the use of their polyurethane resins in combination with a water-soluble resin in a cosmetic composition.

NNSC PATENT/LEGAL DEPT.

Regarding the Examiner's statement that "there is no limitation in the instant claims that recites a water soluble resin in addition to the polyurethanes" (emphasis added), Applicants respectfully but strongly disagree. It is well established that "claims are to be construed in the light of the specification" (U.S. v. Adams, 383 U.S. 39, 48-49, 178 U.S.P.Q. 479, 482 (1966)). In the present case, a cosmetic composition comprising an amphoteric urethane resin and a water-soluble resin is claimed. Page 4, line 4 – page 14, line 20 and page 20, line 18 – page 23, line 15 of the present specification describe the urethane resin component. Page 15, line 3 – page 18, line 10 and page 23, line 16 – page 24, line 18 of the present specification describes the water-soluble resin component. Page 18, lines 11-13; p. 18, line 24 – p. 19, line 1; p. 19, lines 10-11 and 22-23; and p. 20, lines 5-6 all describe mixing/blending/combining the amphoteric urethane resin with the water-soluble resin. "The term 'composition' in chemistry is well-established. It generally refers to a mixture of substances" (Cultor Corp. v. A.E. Staley Manufacturing Co., 49 U.S.P.Q.2d 1533, 1534 (S.D.N.Y. 1998), aff'd, 224 F.3d 1328, 56 U.S.P.Q.2d 1208 (Fed. Cir. 2000)). Accordingly, the present invention is directed towards a cosmetic composition having at least two components - polyurethane and a water-soluble resin.

Finally, neither Bhatt nor Kim teach a polyurethane having both a carboxyl group and a tertiary amine in the same molecule. For at least all of the above reasons, neither Bhatt nor Kim, alone or in combination, teach or suggest the presently claimed composition, particularly the combination of the amphoteric resin and the water-soluble resin, and therefore cannot be said to render the present invention obvious.

It is believed that these remarks overcome the Examiner's rejection of claims 10, 14-15, 17-18 and 20 under 35 U.S.C. § 103(a). Withdrawal, therefore, of the rejection of these claims is respectfully requested.

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Reply to the Rejection of Claims 11-13, 16 and 19 under 35 U.S.C. §103(a)

Claims 11-13, 16 and 19 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Bhatt in view of Kim, and further in view of U.S. Patent No. 5,972,354 to de la Poterie et al. ("de la Poterie") and U.S. Patent No. 5,100,658 to Bolich et al. ("Bolich"). Specifically, the Examiner states -

Bhatt et al. and Kim et al. are applied as discussed above. The references lack a polysiloxane bond and anionic, nonionic, and cationic resins.

de la Poterie et al. teach cosmetic compositions comprising film-forming polymers. Polycondensates, such as anionic, cationic, nonionic, or amphoteric polyurethanes and mixtures thereof are taught as film-forming polymers. The polyurethane is taught as comprising at least one silicone-containing block. The instant films are taught as supple, flexible, elastic, and as not substantially lifting off once applied. See Col. 2, line 17-line 62; Col. 3, line 3-Col. 4, line 42.

Bolich et al. teach silicones, in the form of resins, as hair conditioners. See Col. 13, lines 56-65; Col. 9, lines 51-53.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to add the silicone containing blocks of a polyurethane resin, taught by de la Poterie et al. to the polyurethane resin of the combined references because of the expectation of achieving a polyurethane resin that imparts conditioning properties to the hair, as taught by Bolich et al.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to add anionic, cationic, or nonionic polyurethane resins, as taught by de la Poterie et al., to the composition of the combined references because the combined references teach amphoteric polyurethanes and de la Poterie et al. teach anionic, cationic, nonionic, and amphoteric polyurethane resins as combinable and because of the expectation of achieving compositions with films that are supple, flexible, elastic, and do not substantially lift off once applied.

For the following reasons, Applicants respectfully traverse the Examiner's rejection of claims 11-13, 16 and 19 as being unpatentable over Bhatt in view of Kim, and further in view of de la Poterie and Bolich.

Bhatt and Kim were discussed previously, those arguments being incorporated herein. As shown above, neither Bhatt nor Kim teach or suggest the combination of a polyurethane resin with a water-soluble resin for use in a cosmetic composition. In this respect, neither Bhatt nor Kim provides motivation to one skilled in the art to combine those two components in a cosmetic composition.

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Referring to de la Poterie therein is disclosed a cosmetic composition for application to skin, particularly the lips (Abstract; col. 2, lines 63-65). The composition includes an aqueous dispersion of particles of film-forming polymer in a polymeric system (Abstract). Useful film-forming polymers include polycondensate or radical type synthetic polymers, natural polymers and mixtures thereof (col. 3, lines 6-10).

Polycondensates include cationic, nonionic or amphoteric polyurethanes, acrylic polyurethanes, polyvinyl pyrrolidone polyurethanes, polyester polyurethanes, polyurea, polyurea/polyurethanes and mixtures thereof (col. 3, lines 11-15). The polyurethane can be a polyurethane copolymer, polyurea/urethane or polyurea, that is aliphatic, cycloaliphatic or aromatic and includes, by itself or as a mixture, at least one block originating from linear or branched aliphatic and/or cycloaliphatic and/or aromatic polyester, and/or at least one block originating from aliphatic and/or cycloaliphatic and/or aromatic polyether, and/or at least one silicone-containing block, substituted or otherwise, branched or otherwise, (for example, polydimethyl siloxane or polymethylphenyl siloxane) and/or at least one block having fluorine-containing groups (col. 3, lines 16-28). The polyurethanes can also be obtained from polyesters, polyester amides, polyesters containing a fatty chain, polyamides and epoxy ester resins (col. 3, line 29 – col. 4, line 3).

Radical type synthetic polymers include acrylic and/or vinyl polymers or copolymers, preferably anionic ones (col. 4, lines 4-32). Natural polymers include shellac resin, gum sandarac, dammars, elemis, copals, cellulose derivatives and mixtures thereof (col. 4, lines 33-35).

In order for a film to form on the substrate onto which the composition is deposited, the polymeric system of de la Poterie also includes an elongation-modifying compound or plasticizer (col. 5, lines 1-58). Other components such as dyes and/or pigments can be included in the composition, as well as other additives (col. 5, line 59 – col. 6, lines 31).

While de la Poterie broadly lists amphoteric polyurethanes, including those having at least one silicone-containing block, de la Poterie does not teach or suggest that it have both at least one carboxyl group and at least one tertiary amino group in one molecule. Further, de la Poterie does not teach or suggest the combination of its amphoteric polyurethane with one or more water-soluble polymers. Instead, de la Poterie only teaches mixtures of its polymers to form aqueous dispersions (see, e.g., col. 6, lines 51-53). (The SANCURE and NEOREZ

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polymers provided in Example 1 are polyester- or polyether-polyurethanes. No other polymer, water-soluble or otherwise, is exemplified.) The Examples of de la Poterie only illustrate a single film-forming polymer (here, only polyurethane polymers) for use in its compositions. Further, de la Poterie provides no suggestion or motivation to one skilled in the art to include water-soluble polymers in its compositions. For at least these reasons, de la Poterie adds nothing to Bhatt and/or Kim. Even in combination, the references fail to teach the present invention.

Referring to Bolich therein is disclosed a cosmetic composition that includes an active cosmetic component and a vehicle system or rheological modifier for delivering that active (col. 2, line 62 – col. 3, line 45). The vehicle system includes at least two water-soluble thickening polymers and a solvent (col. 3, lines 1-28). The first or primary thickener is a nonionic water-soluble polymer, most preferably a nonionic long chain alkylated cellulose ether (col. 3, line 52 – col. 5, line 43). The second thickener is a water-soluble polymer having a molecular weight greater than 20,000 and which forms a clear solution in water at 25°C and 1% concentration, preferably natural polysaccharides (col. 5, line 45 – col. 6, line 13).

The vehicle system can optionally include a distributing aid for distributing the cosmetic composition onto the hair or skin. These distributing aids are a subclass of the second thickener and are strongly ionic, high molecular weight water soluble polymers such as xanthan gum (col. 7, line 1 - col. 8, line 7).

Still, Bolich does not teach or suggest the use of amphoteric urethane resins having at least one carboxyl group and at least one tertiary amino group in one molecule in combination with its water-soluble thickeners. Further, Bolich provides no suggestion or motivation to one skilled in the art to include amphoteric urethane resins in its compositions. As the polymers of Bolich are directed towards thickening, one skilled the art would not consider Bolich when looking for a polymer that provides improved touch, such as the urethane resins of the present invention. For at least these reasons, Bolich adds nothing to Bhatt and/or Kim. Even in combination, the references fail to teach the present invention

It is believed that these remarks overcome the Examiner's rejection of claims 11-13, 16 and 19 under 35 U.S.C. § 103(a). Withdrawal, therefore, of the rejection of these claims is respectfully requested.

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Based on the above amendments and remarks, allowance of the claims is believed to be in order, and such allowance is respectfully requested.

Respectfully submitted,

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